APPENDIX

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UNITED STATES DEPARTMENT OF
THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

[May 10, 1974]

Memorandum

To: Chief, Conservation Division,
Geological Survey

From: Assistant Solicitor, Minerals

Subject: Time for Commencing Actions to Collect Royalties, Rents, or Other Payments

You have asked us to examine the statute of limitations contained in 28 USC Sections 2415-2416 (1970) and to explain its applicability to accounting and auditing procedures of the Geological Survey.

Prior to the adoption by Congress in 1966 of the statute of limitations, the Federal Government was immune from any time limitations in bringing civil actions, with only a few minor exceptions. Since the adoption of this statute, there has been established a six-year statute of limitations for "every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or in fact." 28 USC Section 2415(a) (1970). A provision in the statute provides that actions that accrued prior to the date of the act shall be deemed to have accrued on the date of enactment. 28 USC Section 2415(g) (1970). There are exclusions from the provisions of the statute for, *inter alia*, cases in which "facts material to the right of action are not known and reasonably could not be known by an official of the United

States charged with responsibility to act in the circumstances." 28 USC Section 2416(c) (1970). The purpose of the statute is to prevent the government from sitting on claims that it knows or should know it has a right to enforce. It prevents the government from bringing a law suit to enforce a claim six years after it has discovered, or should have discovered, the existence of the claim.

It is clear that the statute applies to suits by the government to collect rents and royalties. Royalties are collected by the Geological Survey pursuant to leases, entered into under the Mineral Leasing Act, 30 USC Sections 181 *et seq* (1970), or the Outer Continental Shelf Lands Act, 30 USC Sections 1331 *et seq* (1970), or other similar statutes. In all cases, the rights of the government as lessor and the rights of the lessee are embodied in a lease. A lease is a contract, and failure of the lessee to pay rent or royalties when due gives the lessor an immediate right to sue for breach. The usual remedy for breach of contract is money damages. See 5 *Corbin on Contracts* 990 (1960) and cf. *Continental Oil Co.* v. *United States,* 184 F2d 802 (9th Cir. 1950); *United States* v. *Ohio Oil Co.,* 163 F2d 633 (10th Cir. 1947); *Rumley* v. *United States,* 152 Ct. Cl. 166, 285 F2d 773 (1961).

It should be noted that commencement of administrative proceedings to appeal or review the existence or claim of rents or royalties due would toll the running of the statute until a final administrative decision. Thereafter, the government would have only one year to bring an action in court to collect the moneys due. 28 USC Section 2415(a) (1970). Thus, where the Geological Survey demanded payment of a debt and the operator contested the debt by commencing an administrative review procedure, the six year period would not begin to run during the pendency of the administrative review or the appeal of the administrative decision. After the final

decision in the administrative process, the Justice Department would have one year in which to sue for enforcement of the decision if the operator persisted in his refusal to pay. As you know, the administrative process for review and appeal of assessments against an operator is described in 30 CFR Part 290.

The federal limitations statute contained in Section 2415 should be read in the light of the general legal principles applicable to statutes of limitations in existence prior to its enactment. Generally, unless otherwise provided in a statute of limitations, running of the statute commences on accrual of the right of action, and it is not tolled merely because the party having the right is not aware of it. 54 C.J.S. Limitations of Actions Section 205 (1948). There are exceptions to the general rule. The most obvious exception occurs in statutes of limitation that expressly require knowledge as a prerequisite to the running of the statute. Absent such an express provision, however, lack of knowledge due to fraud or forgery on the part of the person seeking to invoke the statute as a bar has been held to toll the running of the statute. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1945). In tort claims against the Federal Government, it has been held that the statute of limitations, as a matter of Federal law, does not begin to run until the plaintiff has discovered his injuries. *Urie* v. *Thompson*, 337 U.S. 163 (1949) citing *Baily* v. *Glover*, 88 U.S. (21 Wall) 342 (1874). In contract cases in which the accrual of the right of action is contingent on giving notice to the party in breach, failure to give notice tolls the statute, and therefore lack of knowledge that postponed giving notice would effectively toll the statute. 54 C.J.S., *supra* Section 204.

The exclusion contained in Section 2416(c) is one of several contingencies written into the federal statute, due to experiences in the case law, to mitigate the harshness of the statute. The first issue raised by this exclusion is

the identity of the official who must acquire knowledge before the statute begins to run. In the context of the Geological Survey's administrative organization, the Supervisor is the responsible official who must know of the material facts. The legislative history of this section indicates that the Supervisor is the type of responsible official that Congress had in mind, since he is responsible for overseeing operations, receiving payments due under the lease, and enforcing the terms of the lease:

> "It is not intended that the application of this exclusion will require the knowledge at the highest level of the Government. Responsibility in such matters may extend down into lower managerial levels within an agency. As a general proposition, the responsible official would be the official who is also responsible for the activity out of which the action arose. Such an official is the one likely to know whether the material fact does involve the possibility of a cause of action which may be asserted against the Government. S. Rep. No. 1328, 89th Cong. 2d Sess. 6 (1966); 1966 U.S. Code Cong. Admin. News at 2507-2508."

As you are aware, the Supervisor's responsibilities are described in 30 CFR Chapter II in different sections corresponding to the different regulatory functions of the Geological Survey. Thus, the six year period would begin to run when the Supervisor acquired knowledge, or when he should have acquired knowledge, of a debt owed by an operator, and not at the time the existence of the debt were brought to the Director's attention nor at the time the Justice Department were informed.

The second issue raised by the exclusion focuses on what circumstances would be sufficient to invoke the exclusion due to lack of knowledge. Certainly, it seems that where lack of knowledge is due to erroneous information contained in the reports submitted to the Supervisor by the lessee, then the statute would not begin to

run before the concealment were discovered. Congress had in mind the fraud-type situation in adopting this exclusion, and the case law previously alluded to supports such an exception:

> "The committee understands that the principal application of this exclusion will probably be in connection with fraud situations. An example would be where the affirmative act of a wrongdoer has served to conceal the fraudulent act. This type of exclusion is to be found in the law of many States in both fraud and tort limitations. The material facts that are not known must go to the very essence of the right of action. S. Rep. No. 1328, *supra*."

Moreover, the case of concealment is particularly relevant to procedures of the Geological Survey. Operators are required by regulation and by lease terms to submit reports and records to the Geological Survey. If such information is incorrect, due either to mistake or intent to deceive, and the Survey is therefore unaware of claims that it could properly assert against an operator, then the concealment would operate to postpone the running of the six year period unless the Survey were negligent in discovering the concealment. It is our understanding that the Survey systematically audits information supplied to it by operators. We are in no position to judge whether the auditing techniques employed by the Survey are in accord with good business practices. It is our opinion, however, that the statute of limitations cannot be construed as requiring that the Survey do more than its personnel and budgetary resources allow. Hence, we would conclude that, if the Geological Survey is making a good faith effort within its budgetary constraints to audit information supplied by operators, then it is satisfying the duty imposed upon it to discover the existence of debts owed the government.

Whether a delay in the Supervisor's acquisition of knowledge of a breach on the part of a lessee due entirely

to the accounting procedures of the Geological Survey would toll the running of the statute is not entirely clear. Under the general rule, accounting procedures have no effect on the statute of limitations unless they affect the time at which the cause of action accrues. An example of when accounting affects accrual of a right of action is the case in which there are mutual dealings between two parties and an open or running account is maintained between them. 54 C.J.S., *supra* Section 165; *Anglo-Columbian Development Co. v. Stapleton*, 19 F2d 683, 685 (D.C. Cir. 1927). It does not appear that accounts kept by the Geological Survey are open accounts, since amounts due under leases usually have a fixed value and accrue on fixed dates. However, there may be certain accounts, such as royalty accounts, that do not become due until some affirmative action by the Supervisor has been taken, such as assessing the value of royalty oil. Failure of the Supervisor to take action prior to the due date in the lease would toll the running of the statute, not because of accounting procedures, but due to the fact that the right of the Supervisor to demand payment had not yet accrued.

Delay in acquiring knowledge of a breach due to accounting procedures may come within the purview of the statutory exclusion if it is reasonable. The terms of the statute and the legislative history indicate that the reasonableness of the cause of delay in acquiring knowledge should be controlling. The language used in the statute is:

> "[F]acts material to the right of action are not known and reasonably could not be known . . . 28 USC Section 2416(c) (1970)."

This would seem to indicate that, if the accounting procedures used by the Geological Survey are generally in accord with good business practices, then the Supervisor could reasonably rely on such procedures to convey knowledge to him, and any delay consequent thereto

would toll the statute. There is some support for this in the Senate Report:

> "This provision is required because of the difficulties of Government operations due to the size and complexity of the Government. S. Rep. No. 1328, *supra.*

On the other hand, if the accounting procedures are not in accord with good business practices, it does not appear that they would operate to toll the statute of limitations. In such a case, it would be difficult to argue that the Supervisor could not reasonably have known that a right of action eixsted. The passages from the Senate Report previously quoted indicate that Congress was aware of the complexities in governmental regulation, but that the chief utility of the exclusion would be in situations where lack of knowledge was due to actions of the party regulated. It does not appear that Congress intended the exclusion to be used to encourage bureaucratic inefficiencies that cause delay in bringing enforcement actions. Thus, it seems that the Supervisor's lack of knowledge would not be excused if its arises from self-imposed procedures that unnecessarily delay the acquisition of knowledge. The statute imposes a duty on the Supervisor to diligently use the personnel and budgetary resources of the Geological Survey to discover debts owed the government and to take action to collect debts it knows are due.

In conclusion, it is our opinion that the Federal statute of limitations does not begin to run until after the right of the Supervisor to demand payment has accrued. Accrual may be dependent on some affirmative actions of the Supervisor, such as giving notice or assessing the value of royalties due. The statute begins to run against the government when the Supervisor, relying on information conveyed to him by accounting or auditing procedures that are in accord with good business practices, learns of the accrual or when the Supervisor, using such information, reasonably could have known of the accrual.

In cases involving concealment, either intentional or innocent, of amounts owed the government by a lessee or operator, the statute would not begin to run until the government discovered its right of action. This imposes a duty on the Geological Survey to audit information supplied by lessees and operators. In our opinion, the Geological Survey is not under a duty to do more in auditing this information than its personnel and budgetary constraints allow. However, it is under a duty to diligently prosecute a right of action of which it is aware; that is, it must, proceed to collect amounts that it knows are due and owing, so that, if necessary, the Justice Department can institute an enforcement action within six years of the accrual of the right of action.

/s/ Frederick N. Ferguson
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